SUPREME COURT, U. S.

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IN THE

# Supreme Court of the United States

October Term, 1968
No. 225

MONTELL R. MEACHAM, doing business as the "Barbary Coast,"

*Petitioner,*

*vs.*

THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, STATE OF CALIFORNIA,

*Respondent.*

**Petition for Writ of Certiorari to the District Court of Appeal of the State of California.**

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*Petitioner,*

*vs.*

THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, STATE OF CALIFORNIA,

*Respondent.*

**Petition for Writ of Certiorari to the District Court of Appeal of the State of California.**

*To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Petitioner prays that a writ of certiorari issue to review the judgment of the District Court of Appeal for the Second Appellate District of the State of California denying a petition for writ of review entered in the above entitled case on March 28, 1968.

## Opinions Below.

There are no written opinions by the state courts below.

The order of the District Court of Appeal denying the writ of review, and of the California Supreme

Court denying a hearing thereon are set forth hereinafter as Appendix "A."

## Jurisdiction.

1. The judgment of the District Court of appeal was made and entered on March 28, 1968.

2. No rehearing was sought in the court below and no extension sought in this Court within which to petition for certiorari.

3. The statutory provisions believed to confer jurisdiction on this Court to review the judgment in question by writ of certiorari are 28 U.S.C. 1257(3) and Rule 19(I)(a) of the Rules of the United States Supreme Court.

## Questions Presented.

1. Whether entertainment and dancing fall within the protection of the First Amendment to the United States Constitution.

2. Whether Sections 24200(a) of the California Business and Professions Code and Article XX, Section 22 of the California Constitution are unconstitutionally vague and indefinite on their face and as applied in this case.

3. Whether the respondent has denied the petitioner due process of law by suspending his license for acts which are not a violation of any statute, rule or regulation.

4. Whether the California courts have denied the petitioner due process of law by failing to give a judicial hearing on the question of whether petitioner's conduct is cause for a suspension of his license.

## Constitutional Provisions Involved.

The First Amendment to the United States Constitution provides in pertinent part:

Congress ". . . shall make no law . . . abridging the freedom of speech, . . ."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ". . . nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Constitution, Article XX, Section 22 provides in pertinent part:

> "The Department [of Alcoholic Beverage Control] shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverage license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals. . . ."

## Statutes Involved.

1. Section 24200(a) of the California Business and Professions Code reads as follows:

> "The following are the grounds which constitute a basis for the suspension or revocation of licenses:
>
> a. When the continuance of a license would be contrary to public welfare or morals; but proceedings under this Section upon this ground are not a limitation upon the Department's authority to proceed under Article XX, Section 22 of the Constitution."

2. Section 23090 of the California Business and Professions Code is as follows:

> "Any person affected by a final order of the Board, including the Department, may, within the time limits specified in this section, apply to the Supreme Court or to the Court for the Appellate District in which the proceeding arose, for a writ of review of such final order. The application for writ of review shall be made within thirty days after filing of the final order of the Board."

**Statement of the Case.**

The petitioner herein is the holder of a license to sell beer issued by respondent Department of Alcoholic Beverage Control, State of California, and is and has been engaged in the business of operating a beer bar thereunder in the County of Los Angeles, State of California. Following the filing of an accusation by respondent against petitioner, and after an administrative hearing, respondent suspended petitioner's license on October 2, 1967. This suspension was based on findings that petitioner "did employ and use the services of" certain females, "and did permit and suffer the said females to tend bar and wait on patrons while attired in bikini pants with their breasts fully exposed to public view." Based on these facts, which are not disputed, the administrative hearing officer found that "grounds for suspension and revocation of such license exist and the continuance of such license would be contrary to public welfare and morals as set forth in Article XX, Section 22 of the State Constitution, and Section 24200(a) of the Business and Professions Code."

This decision of the administrative hearing officer was adopted by the respondent on October 2, 1967.

On February 14, 1968, following an appeal to the Alcoholic Beverage Control Appeals Board, said Board affirmed the decision of the respondent.

Petitioner filed a petition for writ of mandate in the California District Court of Appeal, Second Appellate District, pursuant to Business and Professions Code, Section 23090. The petition was denied by said Court without hearing and without opinion. Petitioner then petitioned to the Supreme Court of the State of California for hearing, which was denied without hearing and without opinion.

Stay of enforcement pending disposition of this petition has been applied for in this court, and granted.

**How the Federal Questions Were Raised.**

At the administrative hearing in the appeal before the Alcoholic Beverage Control Appeals Board, in the District Court of Appeal, and in the California Supreme Court, petitioner has in his briefs and petitions contended that dancing and entertainment are protected forms of expression under the First Amendment of the Federal Constitution, and that his rights to due process of law under the Fifth and Fourteenth Amendments thereof have been violated by the Attempted suspension of his license in the proceedings, being based on conduct which violates no law, statute or regulation.

## REASONS FOR GRANTING THE WRIT AND ARGUMENTS AMPLIFING THE SAME.

### I.

### Entertainment and Dancing Are Forms of Expression Protected Under the First Amendment.

It is settled that the constitutional protection of freedom of expression includes not only the exposition of ideas, but entertainment and amusement as well.

*Winters v. New York,* 333 U.S. 507, 68 S. Ct. 668, 92 L. Ed. 840;

*Weaver v. Jordan,* 64 Cal. 2d 235, 49 Cal. Rptr. (1966).

It is stated in *Winters,* that:

> "The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best literature."
>
> *Winters v. New York, supra,* 333 U.S. 507, 510.

Citing *Winters,* the California Supreme Court recently expressed that:

> "Also encompassed (within the right of freedom of speech and press) are amusement and entertainment."
>
> *Weaver v. Jordan, supra,* 64 Cal. 2d 235, 242.

Other local ordinances have also defined the mere use of "topless" barmaids as entertainment.

*People v. Foley,* Cr. A. 7278-7280 (1067) (Los Angeles Sup. Ct. App. Dept.);

*People v. Kukkanen,* Cr. A. 7217-7220 (transfer denied by C. A.) (1967) (Los Angeles Sup. Ct. App. Dep.);

*Robins v. County of Los Angeles,* 248 A.C.A. 611;

*People v. Jordan,* Cr. A. 6645 (Los Angeles Sup. Ct. App. Dept.).

In *Adams Newark Theater Co. v. City of Newark,* 120 A. 2d 496 (reversed on other grounds), the owner of a burlesque theater brought an action challenging the constitutionality of a city ordinance prohibiting certain types of performances. In considering this question, the Court remarked at page 498 that:

> "The rights guaranteed by the First Amendment and by our State Constitution are, beyond dispute, applicable to the commercial exhibition of plays and shows and the type of exhibition which the plaintiff herein staged, are shows in every sense of the word being so called burlesque shows."

This principle was reaffirmed in *City of Newark v. Humphries,* 228 A. 2d 550.

The mere fact that commercial activity is involved in the instant case ". . . is in itself, no justification for narrowing the protection of expression secured by the First Amendment."

*Ginzburg v. U.S.*, 86 S. Ct. 942, 949; also see *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, 95 A.L.R. 2d 1412;

*Smith v. People of the State of California*, 361 U.S. 147, 4 L. Ed. 2205, 80 S. Ct. 215 (1959); *Weaver v. Jordan, supra.*

## II.

## Section 22, Article XX of the California Constitution Is Void for Vagueness as Applied Herein.

### A. The Constitutional Requirement of Fair Warning Applies to Laws Regulating Conduct or Imposing Sanctions Upon Conduct.

The requirement that a statute be clear and definite is based upon two fundamental considerations:

(1) The statutes guide courts and administrative tribunals in the adjudication of various rights, duties and liabilities;

(2) They also serve as guides to the individual subject to them in planning their future conduct,[1]

1. As guides to adjudication, laws must be sufficiently definite to provide judges, juries and administrative tribunals with adequate standards for enforcing the legislative mandate uniformly and consistently in accordance with the legislative intent. *United States v. Petrillo*, 332 U.S. 1, 67; *Mahler v. Ebby*, 264 U.S. 32, 44 S. Ct. 457, 68 L. Ed. 549. A provisions of

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[1]For a discussion of these considerations see Note, Due Process Requirement of Definiteness In Statutes, 62 Harvard Law Review 77 (1948); Amsterdam, Note, 109 U. Pa. L. Rev. 67; *cf. United States v. Petrillo*, 332 U.S. 1, 7; *Musser v. Utah*, 333 U.S. 95, 68 S. Ct. 397, 92 L. Ed. 562.

law regulating the licensing and sale of alcoholic beverages, like any other, can be challenged on the ground that it provides neither the administrative authorities nor the courts with any reliable basis for determining what types of conduct are proscribed under the law and thus, improperly leaves the selection of prohibited acts to the caprice of administrative officials. *Seagram v. Hostetter,* 86 S. Ct. 1254, 384 U.S. 35, 16 L. Ed. 2d 336, 678 (reh. den.) (1966).

In considering a challenge for vagueness the Courts will generally go beyond the face of the statute alone.

> ". . . if the statute has been judicially construed, such construction of the statutory words become part of the statute 'as if it had been so amended by the legislature.'"
>
> *In re Davis, supra,* 244 A.C.A. 760, 51 Cal. Rptr. 702.

Additionally, further assistance may be derived from legislative history or an established common meaning, *In re Newbern, supra,* 53 Cal. 2d 786, 795, 3 Cal. Rptr. 364; *People v. McCaughan* (1957) 49 Cal. 2d 409, 317 P. 2d 974 or a requirement of specific intent. *Screws v. United States,* 325 U.S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495; *Erlich v. Municipal Court,* 55 Cal. 2d 553, 11 Cal. Rptr. 758.

2. Although all statutes must guide adjudication, some must serve, in addition, to give guidance to individuals with respect to their future conduct. Many statutes, for example, require the performance or avoidance of specified acts. Elementary fairness requires that such acts be described in the statute with sufficient precision to give the individual adequate notice of what

conduct he must either perform or avoid, it is with respect to this function of statutes that the void-for-vagueness principle had its origin and with which it has been most often concerned. This is made clear by the Court's statement of the principle in *United States v. Harriss*, 347 U.S. 612, 98 L. Ed. 989, 74 S. Ct. 808 (1954).

> "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."

Similarly, in *Connally v. General Construction Co.*, 269 U.S. 385, 46 S. Ct. 120, 70 L. Ed. 322, the Court declared:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men to common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

In a multitude of other decisions, this Court has similarly stressed that the "constitutional requirement of definiteness" in a statute (*United States v. Harriss*,

*supra,* at 617) flows from the fact that it is the function of the statute to serve as a guide for conduct.[2]

This applies to statutes imposing civil sanctions as well as criminal statutes. See, *e.g., Small Co. v. American Sugar Refining Co.,* 267 U.S. 233, 45 S. Ct. 462, 69 L. Ed. 589 (1925); *Miller v. Strahl,* (1915) 239 U.S. 426, 36 S. Ct. 147, 60 L. Ed. 364; but *cf. Levy Leasing Co. v. Siegel,* 258 U.S. 242, 42 S. Ct. 289, 66 L. Ed. 595. There again, the Court has stressed that the invalidity of the statute challenged was a consequence of the fact that, through the enactment purported to establish a rule of conduct, it was too vague to give adequate guidance. Thus, in *Small Co. v. American Sugar Refining Co., supra,* the Court stated (267 U.S. at 239):

> "The defendant attempts to distinguish those cases (prior decisions of the Court holding criminal statutes invalid on grounds of vagueness) because they were criminal prosecutions. But that is not an adequate distinction. The ground or principle of the decision was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all."

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[2] *Winters v. New York,* 333 U.S. 507, 515-520; *Boyce Motor Lines v. United States,* 342 U.S. 337, 72 S. Ct. 329, 96 L. Ed. 367; *United States v. Spector,* 343 U.S. 169, 72 S. Ct. 591, 96 L. Ed. 863 (1952); *United States v. Cardiff,* 344 U.S. 174, 73 S. Ct. 189, 97 L. Ed. 200 (1952); *United States v. Kahriger,* 345 U.S. 22, 78 S. Ct. 510, 97 L. Ed. 754 (1953); *Roth v. United States,* 354 U.S. 476, 1 L. Ed. 2d 3, 77 S. Ct. 1304 (1957).

**B. The Scope of Term "Conduct Contrary to Public Welfare or Morals" as Applied by the California Courts.**

In the recent case of *In re Davis,* 242 Cal. App. 2d 645, 51 Cal. Rptr. 702, the Court considered whether the phrase "outraging public decency" was void-for-vagueness. In an attempt to avoid a finding of uncertainty the Court there considered prior judicial construction, legislative history, established common law meaning, dictionary definitions and a requirement of specific intent. Failing to find adequate assistance in these areas, the Court declared that portion of Section 650½ Penal Code void unconstitutionally vague.

On its face the phrase "contrary to public welfare or morals" is at least as vague and indefinite as "outraging public decency." Also see *Giaccio v. State of Pennsylvania,* 382 U.S. 923, 85 S. Ct. 1558, 14 L. Ed. 2d 682 (1966) wherein the phrase "outrageous to morality and justice" was held void-for-vagueness. Contrary to these foregoing cases, the California courts have applied the term "contrary to public welfare or morals" to specific conduct on numerous occasions. Many of these cases have been pointed out by the respondent.

For example, in *Vallerga v. Department of Alcoholic Beverage Control,* 53 Cal. 2d 313, 1 Cal. Rptr. 494, certain licensees were charged with violating Section 24200 subdivision (e) of the Business and Professions Code in that they permitted licensed premises to be a resort for lesbians and homosexuals. Based on the reasoning of the Court in *Stoumen v. Reilly,* 37 Cal. 2d 713, 234 P. 2d 969, the Court held that Section 24200, subdivision (e) of the Business and Professions Code was unconstitutional. However, the Court indicated that

the evidence indicated some lewd acts or misconduct by homosexuals on the licensed premises and that the Department, if the licensee is otherwise accorded due process of law, may possibly charge the licensees with conduct contrary to public welfare or morals within the meaning of Section 22, Article XX of the Constitution. The Court noted that the conduct in question was similar to that found in the case of *Nickola v. Monro,* 162 Cal. App. 2d 449, 328 P. 2d 721 and *Kershaw v. Department of Alcoholic Beverage Control,* (1957) 155 Cal. App. 2d 544, 318 P. 2d 494 it was evident that on certain occasions male couples were seated at tables or booths at the licensed premises kissing or embracing each other or rubbing or grabbing the genitals and private parts of one another. This conduct was held to be, *inter alia,* contrary to public welfare and morals under Section 22, Article XX of the Constitution. *Adler v. Department of Alcoholic Beverage Control,* 174 Cal. App. 2d 256, 344 P. 2d 336 involved a taxi-dance bar where the evidence indicated that one taxi-dancer was rubbing her hands against the legs of patrons and touching a male patron in the public area asking him to go home with her and then performing a sexually suggestive dance act. One of the other dancers was demonstrating her peek-a-boo dress by exposing her breasts to an individual who happened to be an agent of the Department. These events taken as a whole were considered to support the findings of the Department that the licensed premises were permitted to be used for purposes injurious to public morals. It seems, therefore, in the *Adler* case the exposing of the breast was just an adjunct to other outlandish conduct by the taxi-dancers. *Jacques Incorporated v. State*

*Board of Equalization,* 155 Cal. App. 2d 446, 318 P. 2d 6 involved the exhibition of a lewd show and the permitting of lewd and obscene conduct on the licensed premises in violation of Section 311 of the Penal Code. This conduct was held to be contrary to public welfare and morals. Lewd and indecent acts between males on three different occasions were found in the case of *Morell v. Department of Alcoholic Beverage Control,* 204 Cal. App. 2d 504, 22 Cal. Rptr. 405. Violations of other laws not related to sex and lewd conduct have also been held to constitute conduct contrary to public welfare and morals. In *Mack v. Department of Alcoholic Beverage Control,* 178 Cal. App. 2d 149, it was found that bookmaking and gambling on licensed premises contrary to public morals. Similarly, the Court held in *MacFarlane v. Department of Alcoholic Beverage Control,* 51 Cal. 2d 84, 330 P. 2d 769, that where a licensee violated Penal Code Section 337 (bookmaking), this constituted conduct contrary to public welfare and morals. In *Cornell v. Reilly,* 127 Cal. App. 2d 178, a licensee violated Section 3030 of the Penal Code by permitting female employees to procure and encourage the sale of alcoholic beverages. This was also held to be contrary to public welfare or morals.

Finally, in *Mercurio v. Department of Alcoholic Beverage Control,* 144 Cal. App. 2d 626, 301 P. 2d 474, a licensee was charged with violating Rule 143 which forbids females from accepting alcoholic beverages on the licensed premises. As noted by the Court, "the rule was adopted to enable the board to exercise the powers conferred upon it by the Constitution." It was passed under the authority of Section 25750 of the Business and Professions Code. However, the licensee contended that its license could be revoked only for a violation of

a law and not of a board rule. In response to this contention the Court stated:

> "It is obvious that, as amended, the Constitution provides for revocation if the continuance of the license would be contrary to public welfare or morals, which includes violations of board rules as well as laws dealing with liquor establishments, and for violation of any laws prohibiting conduct involving moral turpitude. The latter would include laws not expressly dealing with liquor establishments."

The Court in *Mercurio* capsulized the application of the term "conduct contrary to public welfare or morals" to specific conduct. If the conduct violates a specific board rule or any laws dealing with liquor establishments or any laws prohibiting conduct involving moral turpitude, then that conduct is contrary to public welfare or morals. Rule 143 was determined constitutional and valid in *Mercurio* and the violation thereof was held to be contrary to public welfare or morals. A careful examination of the foregoing cases together with other cases applying the term "conduct contrary to public welfare or morals" indicates that all applications of Section 22, Article XX of the Constitution have fallen within the framework mentioned in *Mercurio*. These are the cases which have given some definition to a term which would otherwise be void-for-vagueness. It is submitted that in order to avoid the anti-vagueness of the United States Constitution, applications of the term "contrary to public welfare or morals" must clearly and unequivocally fall within that framework.

In *Stoumen v. Reilly*, 37 Cal. 2d 713, 234 P. 2d 969, an accusation charged a licensee with conducting a disorderly house and with selling alcoholic beverages to a minor. It was found by the hearing officer that the licensee "kept and permitted his licensed premises to be used as a disorderly house in that . . . persons of known homosexual tendencies patronized said premises and used said premises as a meeting place. . . ." and that beer bar was a "hangout" for homosexuals, that arrests were made for demonstrated homosexual actions by patrons but there were no convictions, and that there was no evidence of any illegal or immoral conduct on the premises or that the patrons resorted to the licensed premises for purposes injurious to public morals. The Court analogized this case *In re Farley*, 217 N.Y. 105, 111 N.E. 479 where it was held that a liquor license could not be revoked on the ground that prostitutes had dined in the licensee's restaurant, and *Patterson v. State*, 9 Okla. Cr. 564, 132 Pac. 693, 695 where a conviction of maintaining a bawdy house was not supported by evidence that women of loose or immoral character had obtained lodging in defendant's hotel. The court held that evidence was insufficient to support a finding that the licensee kept a disorderly house which was injurious to public morals. However, the Department contended that even if the evidence does not support the keeping of a disorderly house, it, nevertheless, indicates conduct contrary to public welfare or morals in violation of Section 22, Article XX of the Constitution. In response to this contention, the Court stated: "In order to establish good cause for suspension of plaintiff's license, something more must be shown than that many of his patrons were homosexuals

and that they used his restaurant and bar as a meeting place" In other cases where "something more" was shown and held to be contrary to public welfare or morals, the conduct amounted to a violation of Section 647, subsection a, of the Penal Code (lewd or dissolute conduct in a public place). See *e.g., Kershaw v. Department of Alcoholic Beverage Control, supra,* 155 Cal. App. 2d 544; *Adler v. Department of Alcoholic Beverage Control, supra,* 174 Cal. App. 2d 256.

III.

**The Employment of "Topless Waitresses" in a Licensed Premises Is Not Violative of Any Law.**

On several specified occasions petitioner permitted certain female employees to wait on patrons at his licensed premises while attired in a costume which fully bared said female employees' breasts to the view of patrons. There are no allegations of indecent exposure in violation of Section 314 (1) Penal Code or of lewd and dissolute conduct in a public place in violation of Section 647(a) Penal Code. It is charged in said accusation that such conduct, alone, without more, constitutes conduct contrary to public welfare and morals in violation of Article XX Section 22 of the Business and Professions Code.

It has recently been made abundantly clear that the mere display of naked female breasts in an establishment such as a bar, is not a violation of law. *In re Davis,* 242 Cal. App. 2d 645, 51 Cal. Rptr. 702. Also see *Robins v. County of Los Angeles,* 248 Cal. App. 2d 1. Furthermore, no rule or regulation has been promulgated by the Department of Alcoholic Beverage Control declaring that permitting a barmaid or waitress to

bare her breasts in an establishment licensed by the Department constitutes conduct contrary to public welfare and morals.

It is clear that the Department of Alcoholic Beverage Control has the authority to promulgate rules and regulations for the purpose of enforcing the Alcoholic Beverage Control Act, Article XX Section 22 of the California Constitution. Pursuant to said authority the Department has enacted certain rules and regulations contained in Chapter 1, Title 4 California Administrative Code. Moreover, Section 1 of said rules and regulations provide that:

> "Violation of any rule or regulation by a licensee, his agent or employee shall be deemed contrary to public welfare and morals and grounds for suspension or revocation of a license."

The basic minimum procedural requirements for the adoption, amendment or repeal of administrative rules and regulations are set forth in Section 11420 *et seq.* of the Government Code.

However, the Department asserts that it is not enforcing a rule or regulation in this case, but rather is acting under its constitutional power derived from Section 22, Article XX of the California Constitution empowering the Department of Alcoholic Beverage Control:

> ". . . in its discretion, to suspend or revoke any specific alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to public welfare or morals."

The phrase "contrary to public welfare or morals" is no less vague and indefinite than the term "outrag-

ing public decency" considered in the case of *In re Davis,* 242 Cal. App. 2d 645, 51 Cal. Rptr. 702. In holding that Penal Code Section 650½ was unconstitutionally vague and indefinite the Court in *Davis* first looked to judicial interpretation and legislative history and intent to see if some certainty could be given to the phrase "outraging public decency." See *Winters v. People of the State of New York,* 333 U.S. 514, 68 S. Ct. 665; *In re Newbern,* 53 Cal. 2d 786, 3 Cal. Rptr. 364.

A review of the authorities cited by respondent below indicates that in fact Section 22, Article XX of the California Constitution conduct contrary to public welfare or morals has been limited to the following situations: It is contrary to public welfare and morals to permit patrons or employees to conduct themselves on licensed premises in a lewd, dissolute or obscene manner, or present lewd or obscene exhibitions, to commit crimes on the licensed premises, or to violate any rule or regulation of the Department of Alcoholic Beverage Control or its predecessor, State Board of Equalization.

Further, in *Mercurio v. Department of Alcoholic Beverage Control,* 144 Cal. App. 2d 626, 301 P. 2d 474 the Court was confronted with the question as to whether a violation of a rule promulgated by the Department constituted a ground for disciplinary action. In response the Court stated:

> "It is obvious that, as amended, the Constitution provides for revocation if the continuance of the license would be contrary to public welfare or morals, which includes violation of Board rules as well as laws dealing with liquor establishments, and for violation of any law prohibiting conduct in-

volving moral turpitude. The latter would include laws not expressly dealing with liquor establishments."

California courts have intepreted conduct contrary to public welfare or morals only to include acts which violate the law (dealing with liquor establishments or involving moral turpitude) or which violate a Department rule or regulation. The mere use of "topless" waitresses in a licensed establishment is not violative of any law of this state. *In re Davis, supra,* 242 Cal. App. 2d 645, 51 Cal. Rptr. 702; *Robins v. County of Los Angeles,* 248 Cal. App. 2d. There is no evidence of lewd or obscene conduct by these waitresses. This conduct clearly falls outside the ambit of the phrase "conduct contrary to public welfare or morals" as interpreted and applied by the Courts. Admittedly, the Department has no rule or regulation proscribing the use of "topless" barmaids and employees. Absent a rule or regulation and without the assistance of prior application of the phrase "contrary to public welfare or morals" by our courts to the conduct in question, it is submitted that the Department's attempt to apply this phrase to the conduct in question is unconstitutionally vague and indefinite.

Section 25750 of the Business and Professions Code provides that:

> "Department shall make and prescribe such reasonable rules as may be necessary or proper to carry out the purposes and intent of Section 22 of Article XX of the Constitution and to enable it to exercise the powers and perform the duties conferred upon it by that Section or by this Division . . ." (Emphasis added.)

Assuming *arguendo* that the Department has the power to promulgate a rule or regulation proscribing the use of "topless" barmaids and employees on licensed premises,[3] its failure to promulgate such a rule or regulation renders its action herein nugatory. The anti-vagueness proscription of the United States Constitution may have been avoided by the Department if it had enacted such a rule or regulation. This omission and the fact that the questioned conduct falls outside the ambit of prior construction and interpretation by our courts of the phrase "contrary to public welfare or morals" deprives petitioner of fair notice of acts to be avoided with respect to his conduct of licensed premises. The mandate of Section 25750 of the Business and Professions Code to the Department is clear. The Department shall make and prescribe such reasonable rules as may be necessary or proper to carry out the purposes and intent of Section 22, Article XX of the Constitution. Therefore, if the Department felt that it is the purpose and intent of Section 22 of Article XX of the Constitution to proscribe the use of "topless" barmaids or employees it should have promulgated a rule or regulation to that effect. The provisions of Section 22, Article XX of the Constitution are only self-executing if the licensee is otherwise accorded due process of law. *Vallerga v. Department of Alcoholic Beverage Control,* 53 Cal. 2d 313. 1 Cal. Rptr. 494. By ignoring the legislative mandate and Section 25750, Business and Professions Code, the Department has deprived petitioner of due process of law.

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[3]However, petitioner seriously questions such a rule or regulation in light of *Stoumen v. Reilly,* 37 Cal. 2d 713, 234 P. 2d 969.

*In re Davis, supra,* 242 Cal. App. 2d 645, 51 Cal. Rptr. 702, considered the question as to whether a woman who exposes her bare breasts without suggestive movements before a limited group of adults of both sexes outrages public decency by any and all definitions of that term. In reversing convictions against defendants there, the Court declared that the term "outraging public decency" was unconstitutionally void-for-vagueness. Moreover, the mere use of "topless" waitresses in the licensed establishment is not violative of any other law of this state. *Robins v. County of Los Angeles,* 248 Cal. App. 2d 1. This accusation herein merely alleges that petitioner employed "topless" waitresses at his licensed establishment on specified dates. There is no evidence of lewd or obscene conduct by any of these waitresses. Morreover, there were no "suggestive" movements by these waitresses alleged or proven. In other words, neither petitioner nor his waitresses have violated any state law. The Department has passed no rule or regulation prohibiting the use of "topless" waitresses. Our Courts have not applied the term "contrary to public welfare or morals" to specific conduct which did not either violate a board rule, violate a law dealing with liquor establishments, or violate a law prohibiting conduct involving moral turpitude. The Department is not attempting to apply the phrase "contrary to public welfare or morals" to conduct which is not otherwise a crime or proscribed by a rule. It is petitioner's position that absent a rule or regulation and without the assistance of prior judicial construction of the phrase "contrary to public welfare or morals" to include the conduct in question, the Department's attempt to apply this phrase herein renders this phrase unconstitutionally

vague and indefinite. Moreover, for the reasons herinafter stated, the Department by not issuing a rule has failed to operate and proceed in the manner prescribed by law.

IV.

**The Rule-Making Process Cannot Be Circumvented.**

Prior to the 1954 Amendment of Section 22, Article XX of the Constitution, said Section read in pertinent part as follows:

> "The State Board of Equalization . . . shall have the power, *in its discretion,* to deny or revoke any specific liquor license if it shall determine for good cause the granting or continuance of such license would be contrary to public welfare or morals." (Emphasis added).

In 1954, said Section was amended to its present form to read in pertinent part as follows:

> "The Department of Alcoholic Beverage Control shall have the exclusive power, *except as herein provided and in accordance with the laws enacted by the Legislature,* . . . The Department shall have the power in its discretion to suspend or revoke any specific alcoholic beverage license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals. . . ."

This amendment must be read in conjunction with Section 25750 of the Business and Professions Code which provides in pertinent part, as follows:

> "The Department *shall make and prescribe such reasonable rules as may be necessary* or proper to carry out the purposes and intent of Section 22,

Article XX of the Constitution and to enable it to exercise the powers and perform the duties conferred upon it by that Section or by this Division. . . ." (Emphasis added.)

The legislative mandate of the Department contained in Section 25750 is abundantly clear. The Department shall make and prescribe such reasonable rules as may be necessary or proper to carry out the purposes and intent of Section 22, Article XX of the Constitution. Judicial application of the term "contrary to public welfare or morals" as contained in Section 22, Article XX of the Constitution renders it unnecessary to pass a rule or regulation when the conduct violates laws dealing with liquor establishments or any law prohibiting conduct involving moral turpitude. See *Mercurio v. Department of Alcoholic Beverage Control, supra,* 144 Cal. App. 2d 626, 301 P. 2d 474. If the Department intends to prescribe conduct which it deems contrary to public welfare or morals outside of this area, it shall prescribe reasonable rules. Under these circumstances, it becomes necessary to prescribe such a rule to carry out the purposes and intent of said section and to accord a licensee due process of law. Any other interpretation of Section 25750 of the Business Code would nullify the purpose of this legislative act. Further, by its attempt to avoid the rulemaking process, the Department has failed to act in accordance with the laws enacted by the legislature, in violation of Section 22, Article XX of the California Constitution as amended in 1954.

## V.

## Petitioner Has Been Deprived of an Important Right Without a Judicial Hearing, Without Judicial Opinion or Findings, and Without the Right to Make Oral Argument.

The administrative hearing and administrative appeal below were followed by petition for writ of review filed in the District Court of Appeal, pursuant to Business and Professions Code Section 23090 as amended in 1967. This petition was summarily denied without hearing and without opinion. There followed a petition for hearing to the California Supreme Court which was also summarily denied without hearing and without opinion.

Prior to the amendment of the Business and Professions Code, Section 23090 in 1967, judicial review was sought in the Superior Court, where "petitioners usually bring administrative mandamus proceedings before the court on the merits by obtaining an alternative writ, which contains an order to show cause," or by noticed motion in the trial court. Deering, *California Administrative Mandamus,* California Continuing Education of the Bar, page 176. The elimination of the trial courts in the procedure on review of administrative mandamus in these cases creates a situation where, as a practical matter, licensees like petitioner are denied their day in court. The appeals courts, with their crowded calendars and custom of avoiding hearings in matters of original jurisdiction (3 Witkin, California Procedure, 2470, Extraordinary Writs, Section 8) will not give "the fullest opportunity for plenary" judicial review, such as this court has required in federal courts, on questions of constitutional rights. *Fay v. Noia,* N.Y. 1963, 83 S. Ct. 822, 372 U.S. 391, 9 L. Ed. 2d 837.

A liquor licensee is entitled to fair proceedings under the due process clause of the federal constitution; he is entitled to a decision which is not arbitrary or capricious, but which is based on substantial evidence which the applicant had full opportunity to refute. *Nimkoff v. Payne,* 93 U.S. App. D.C. 123, 210 F. 2d 689 (1953). An applicant for a license is entitled to an opportunity by notice for a hearing and answer as would constitute due process. *Goldsmith v. U.S. Board of Tax Appeals,* 270 U.S. 117, 123, 46 S. Ct. 215, 70 L. Ed. 494, 497 (1926).

Once a business is established pursuant to a license, property rights attach and the license cannot be suspended without procedural and substantive due process. *Jordan v. United Insurance Company of America,* 289 F. 2d 778, 10 U.S. App. D.C. 112 (1961).

In a number of cases, this court has recognized that certain substantial rights could not be affected without a judicial determination of certain facts. *Crowell v. Benson,* 285 U.S. 22, 52 S. Ct. 285, 76 L. Ed. 598 (1932); *Ohio Valley Water Co. v. Ben Avon,* 253 U.S. 287, 40 S. Ct. 527, 64 L. Ed. 908 (1920); *Ng Fung Ho v. White,* 25 U.S. 276, 42 S. Ct. 492, 66 L. Ed. 938 (1922). Petitioner contends that he is entitled to a judicial determination of the questions raised in this proceeding, and that the record does not indicate that such a judicial determination has been given. No court has permitted the petitioner the right to put on evidence or to make oral argument; no court has issued an opinion or findings indicating any resolution of the constitutional problems raised. These are complex and important issues, and should not be relegated to the mechanical process of summary denial.

## Conclusion.

This court has not heretofore passed on the issues presented herein. It is therefore urged that this Court grant the petition for certiorari.

Respectfully submitted,

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